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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
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11 DAVID WESLEY BIRRELL, aka Bella-
12 Christina Birrell,

13 Plaintiff,

14 v.

15 MICHELLE DiTOMAS,

16 Defendant.
17

No. 2:22-CV-1834-KJM-DMC-P

ORDER

18 Plaintiff, a prisoner proceeding pro se, brings this civil rights action pursuant to
19 42 U.S.C. § 1983. Pending before the Court is Plaintiff's first amended complaint. See ECF No.
20 27.

21 The Federal Rules of Civil Procedure provide that a party may amend his or her
22 pleading once as a matter of course within 21 days of serving the pleading or, if the pleading is
23 one to which a responsive pleading is required, within 21 days after service of the responsive
24 pleading, see Fed. R. Civ. P. 15(a)(1)(A), or within 21 days after service of a motion under Rule
25 12(b), (e), or (f) of the rules, whichever time is earlier, see Fed. R. Civ. P. 15(a)(1)(B). In all
26 other situations, a party's pleadings may only be amended upon leave of court or stipulation of all
27 the parties. See Fed. R. Civ. P. 15(a)(2).

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1 Here, Defendant filed a motion to dismiss under Federal Rule of Civil Procedure
2 12(b)(6) on June 30, 2023. See ECF No. 19. Thus, any amendment-as-of-right was due within
3 21 days of this date. See Fed. R. Civ. P. 15(1)(1)(B). Plaintiff's first amended complaint was
4 filed on January 16, 2024 – more than 21 days after June 30, 2023. See ECF No. 27.

5 Where, as here, a party files an amended complaint without the right to do so or
6 leave of court having been previously granted, it is properly stricken by the Court. See, e.g.,
7 Hardin v. Wal-Mart Stores, Inc., 813 F. Supp. 2d 1167, 1181 (E.D. Cal. 2011) (striking fourth
8 amended complaint: "If an amended pleading cannot be made as of right and is filed without
9 leave of court or consent of the opposing party, the amended pleading is a nullity and without
10 legal effect."); Sexton v. Spirit Airlines, Inc., Case No. 2:21-cv-00898-TLN-AC, 2022 WL
11 976914 (E.D. Cal. March 31, 2022) (striking amended complaint); Guthrie v. Hurwitz, Case No.
12 1:18-cv-00282-AWI-BAM, 2018 WL 4005261, at *1 (E.D. Cal. Aug. 20, 2018) (striking
13 amended complaint).

14 Defendant's motion to dismiss Plaintiff's original complaint will be addressed by
15 separate findings and recommendations.

16 Accordingly, IT IS HEREBY ORDERED that Plaintiff's first amended complaint,
17 ECF NO. 27, is STRICKEN. This Order is without prejudice to any further effort by Plaintiff to
18 properly seek leave of Court to file the subject First Amended Complaint.

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20 Dated: January 31, 2024



21 DENNIS M. COTA
22 UNITED STATES MAGISTRATE JUDGE
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